

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

STAGE HANDS REFERRAL SERVICE, LLC

*

Case No. 34-CA-10971

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and

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STEPHEN FOTI, AN INDIVIDUAL

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INTERNATIONAL ALLIANCE OF THEATRICAL &
STATE EMPLOYEES & MOTION PICTURE
TECHNICIANS OF THE UNITED STATES &
CANADA, LOCAL 84, AFL-CIO
(Meadows Music Theatre)

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Case No. 34-CB-2774

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STEPHEN FOTI, AN INDIVIDUAL

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INTERNATIONAL ALLIANCE OF THEATRICAL &
STAGE EMPLOYEES & MOTION PICTURE
TECHNICIANS OF THE UNITED STATES &
CANADA, LOCAL 84, AFL-CIO
(Hartford Civic Center)

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Case No. 34-CB-2876

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STEPHEN FOTI, AN INDIVIDUAL

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February 2, 2009

RESPONDENTS' EXCEPTIONS TO SUPPLEMENTAL DECISION

1. Exception to methodology in calculating and applying supplemental earnings: In the Respondents' brief, the Respondents showed that the Region's designation of the claimant's non-Local 84/SRS work during the backpay period was not in reality "supplemental earnings." Foti had no supplemental earnings at all because he had just one job; he was a stagehand. The designation of the non-Local 84/SRS stagehand work as supplemental earnings was unreasonable, arbitrary, capricious, and

without support in the record. It greatly skewed the Region's calculations. See pages 4-8 of the Respondents' brief and the citations to the transcript therein (transcript pages 182-196, 201, 480-486, 550-559); pages 17-19 of the respondents' brief, and the citations therein (Transcript pages 45-75, 144, 109-110, 172-173, 493). The Administrative Law Judge's only references to this issue are on pages 5 and 10 of the decision, and the judge did not address the Respondents' argument at all-- that Foti did not have a second job, and his non-Local 84/SRS work should not have been treated as if Foti were simply moonlighting.

2. Exception to inclusion of Entertainment Partners employment as "Local 84 work": It was irrational, unreasonable, and arbitrary for the Administrative Law Judge to include in the calculation of "Local 84 work" Mr. Foti's earnings from Entertainment Partners. See Respondents' brief at pages 10-17, and the references to the record therein (Exhibit GC -3, Transcript pages 157-159, 227-232, 236-239, 244-246, 568-569). This was not addressed by the Administrative Law Judge. Foti worked on the movie both before and after he was turned down for membership; he admitted he got the referral from a friend and from Local 1. Even if it is true, as the Administrative Law Judge wrote, that Mr. Buckland's informing Mr. Foti on a single day that he could report to the movie, there is no dispute that his work on that movie both before and after that one day was not Local 84 work. Also see pages 8-10 of the Respondents' brief and the citations to the transcript therein (pages 110-116, 60, 116, 154 189), Exhibit GC-10, wherein it is shown that the Region did not even make the decision on what is and what is not "Local 84 work." The region let Mr. Foti make the decision without even telling

him what is meant by the term "Local 84 work" and "non-Local 84 work." This was unreasonable, arbitrary, and capricious. The Administrative Law Judge did not address this.

3. Exception to inclusion of Volume Services America and employment as "Local 84 work":

It was irrational, unreasonable, and arbitrary for the Administrative Law Judge to include in the calculation of "Local 84 work" Mr. Foti's earnings from Volume Services America. As shown on page 14 of the Respondents' brief, and in Exhibit GC-3 and pages 242-243 of the transcript, the referral came from Local 1 in New York. The Administrative Law Judge did not address this.

4. Exception to backpay award after Mr. Foti became a union member: The compliance hearing was held to determine how much money Mr. Foti lost because the Respondents treated him differently because of his status as a non-member of the union. It is uncontested that Mr. Foti became a union member in June or July 2006. It is logically impossible for him to claim compensation because of discrimination based on membership for the period after he became a member, as shown in the Respondents' brief on page 25, citing the transcript at pages 202-204. The Administrative Law Judge's discussion of this is arbitrary, capricious and unreasonable. The judge's only statement on this point is on page 13 of the decision, where the judge states simply that the liability phase of this case is over. This is true, but irrelevant. The purpose of the compliance hearing is to determine how much money Mr. Foti lost as a result of his

being a non-member. The point that Mr. Foti became a member in 2006 was not an issue pertinent to the liability phase of this case, but certainly is pertinent to how long the backpay period runs, which the judge ignored.

5. Exception to extending the backpay period in the fourth quarter of 2004 and afterwards:

The Respondents showed that Foti was unavailable to work with the Respondents after the fourth quarter of 2004, and Foti and the compliance officer admitted that. See the Respondents' brief at page 24 and the pages of the transcript cited therein (Transcript, pages 53, 133, 141-143, 200-201, 485-486, 551-552).

The Respondents also showed that SRS' largest client was lost in the first quarter of 2006, when SRS was no longer able to send stagehands to the Mohegan Sun. See Respondents' Brief at Pages 4, 24-25, and pages 413 and 421 of the transcript. Local 84/SRS was replaced by Local 538. Id. Foti worked consistently and constantly with Local 538, and he could not possibly have taken work elsewhere. See also: Respondents' brief, page 24, and Transcript, 452-453, 477 486-487, 488; Exhibit GC-3.

The Respondents showed at trial that they created a referral system in October 2005 after learning from the charge in this case that the way in which they operated the hiring hall was illegal. See Respondents' brief at page 26, and pages 375-387 of the Transcript. The Administrative Law Judge rejected this contention, citing the fact that there were employees with lower seniority than Mr. Foti who were referred by SRS to the casino. See page 8 of the judge's decision. But the judge ignored the evidence that

Foti was working elsewhere and was not available to work with SRS at the casino. Foti called in for work only a dozen times in 2005 because he was busy elsewhere; in most of 2006 he was fully employed elsewhere. See Respondent's brief at pages 7-8, 23 and pages 260-269, 484-487, 550-560, 589, 603, 606-608. On page 12 of the decision, the Administrative Law Judge makes the point that Foti would have taken a job with Local 84 even though he was working elsewhere. But this is irrelevant and immaterial, and the judge's reliance on it is unreasonable and arbitrary. It is completely irrelevant for purposes of this compliance hearing that Mr. Foti might have preferred to take a Local 84 job. As the judge admitted, and as Foti admitted, Foti could not work two jobs at the same time. See Page 12 of the decision. Foti's work outside Local 84 has to be subtracted from the work he could have gotten with Local 84 in order to avoid giving him the windfall of being awarded money for the time when he was working and unavailable for work within Local 84.

6. Exception to use of a formula to determine the base amount rather than relying on an actual calculation: In pages 30-31 of the Respondents' brief, it was shown that no formula was needed to determine the amount of money Foti would be deemed to have lost following the discrimination. This was because a more accurate calculation could be made by examining the actual call lists for referrals. The Respondents' business manager calculated every call that Foti could have been sent to in the six months following the discrimination and calculated that Mr. Foti lost \$6,039.09, at most. See Respondents' brief at pages 30-31 and Transcript, pages 533-537. This was never addressed by the Administrative Law Judge. This calculation obviated the need for any

formula, because the amount of money Mr. Foti should be paid for each six-month period for which he should be paid anything at all is a known amount. Using the formula to approximate a number which is ascertainable and which was in fact was ascertained is arbitrary and unreasonable.

For the Respondents,

/s/ Leon M. Rosenblatt
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CERTIFICATION

This is to certify that a copy of the foregoing was emailed and mailed, postage prepaid, on this the 2nd day of February, 2009, to:

Board's Office of the Executive Secretary
NLRB
1099 14th Street, N.W.
Washington, DC 20570

Attorney Patrick Daly
National Labor Relations Board
Region 34
One Commercial Plaza
21 Floor
Hartford, CT 06103-3599

Mr. Stephen Foti
52 Balaban Road, Apt. 306
Colchester, CT 06415

Region 34 will be notified by telephone of the substance of the transmitted document and a copy of the document will be served by overnight delivery service.

/s/ Leon M. Rosenblatt
Leon M. Rosenblatt

EXHIBIT B

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REGION 34**

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STEPHEN FOTI, AN INDIVIDUAL

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OCTOBER 6, 2008

RESPONDENTS' COMPLIANCE TRIAL BRIEF

I. INTRODUCTION

The respondents' argument can be divided into two broad categories. The first is that the Region's application of Formula One is deeply flawed. The Region has no ending date on the backpay period; the calculation of the base dollar amount is wildly exaggerated; the Region ignored changed conditions (to wit: Mr. Foti started getting referrals six months after he was turned down for membership and continued to get

referrals from Local 84/STS, SRS's business dried up, Foti networked so well he lost relatively little money, new hiring hall rules were put into place which impacted negatively on Foti's earnings, Foti was nearly fully occupied in 2005 and 2006 outside Local 84's jurisdiction, and Foti became a union member in 2006, thus ending any logical supposition that discrimination continued against him because of his membership status); the Region's definition of and calculation of "supplementary income" was wrong.

The second category is that the Region's use of Formula One is inappropriate in this case. Formula Two and using no formula at all are more reasonable.

II. THE REGION DID NOT APPLY FORMULA ONE PROPERLY

Earnings During Base Period

"Backpay is based first on the earnings a discriminatee would have had but for the unlawful action. Against this gross amount is offset the discriminatee's actual earnings from other employment that took place after the unlawful action. . . . " The difference is the net backpay award. Compliance Manual, § 10536.1 (overview). See Tr. 171. The definition of "gross backpay" is: "What the discriminatee would have earned from respondent had there been no unlawful action." § 10536.2.

Formula One is described in § 10540 of the Case Handling Manual. It is based on the "average hours and/or earnings of the discriminatee prior to the unlawful action." The period prior to the unlawful action is called the "base period." The point is to determine "[t]he average. . . earnings of the discriminatee" during the base period. §10540.1.

Emirzian's Calculation of Gross Backpay During the Base Period

Using Formula One, Compliance Officer Dina Emirzian calculated that Mr. Foti's gross backpay was \$29,757. Tr. 98, 109, 110. This is at least 227% too high, as will be shown below. Foti earned about \$13,000 from the respondents' referrals in the twelve months preceding Local 84's rejection of his membership application.

Local 84 and SRS

Respondent Local 84 is headquartered in West Hartford, Connecticut. Local 84 supplies stagehands to stage productions such as plays and musical performances. It has contracts with a small number of employers in the Hartford area, including the Hartford Civic Center (now the XL Center), the Horace Bushnell Theater for the Performing Arts, the Meadows (now the Dodge), the Hartford Symphony, and the Connecticut Opera. Tr. 342-345. The Warner Theater is somewhat of a special case. It is a community theater with which Local 84 has an agreement to supply labor, through Theatrical Stage Employees (TSE), but there is not a full collective bargaining agreement covering all aspects of employment. Tr. 524-525, 527. Local 84 enters into one-day agreements and one-day trust agreements when Local 84 refers stagehands there. Tr. 350.

In July 2006, Foti became a member of IATSE Local 538, which covered New London and Eastern Connecticut, and Western Rhode Island. Tr. 487. A month later, the International ordered the merger of Local 538 into Local 84, and Foti became a member of Local 84. Tr. 419.

Respondent SRS is a limited liability corporation formed and run by Local 84 for the purpose of obtaining employment referral agreements with employers who will not enter into referral agreements directly with Local 84. SRS's principal "client" was the Mohegan Sun Casino, located on a Native-American reservation that refused to recognize unions directly, but which was willing to hire union employees through the interface of SRS. Tr. 337-338, 339-342. The Mohegan Sun work had a large impact on Local 84 while it lasted. As Business Manager Buckland put it, it "affected this local tremendously. We went from a ... fairly small local with only one [or two] sizable venues to [having to staff] shows almost daily." Tr. 412. Foti worked principally at the Mohegan Sun. Tr. 452-453, 477.

But in the first quarter of 2006 (March 2006), SRS ended its relationship with the Mohegan Sun. Tr. 413. SRS was replaced by stagehands who formerly had been part of Local 538. Tr. 421.

Of the 150 members of Local 84 on the books, fewer than 60 are active stagehands. Tr. 370, 449-450. Of these, approximately 12 have full-time positions within the jurisdiction of Local 84. Tr. 451. They hold the "house positions," permanent positions, at the several venues that have full-time positions. Tr. 353.

Local 84 uses 200 to 300 extras to reach the manpower requirements of the load-in and load-out of large concerts and shows. Tr. 406.

Foti's Networking

The typical stagehand leads a peripatetic existence. Mr. Foti is one of them. "[T]his business is very transient, and there's a big turnover.... There isn't forty hours [of

work] in a week." Tr. 447-448. Those who are full time stagehands, except for those few who have house positions, get by by "networking," and Foti is good at it. Before, during, and after the base backpay period, Foti engaged in what he called "networking" so effectively that he lost very little money as a result of being denied membership in Local 84.

Foti described his vocation as working "in entertainment." "All the work I do is in entertainment. I don't do roofs. I don't do gutters," he said. Tr. 182. He acknowledged that Local 84/SRS was just one source of employment for him, and it was a relatively minor source. Tr. 182. He specializes in "audio work," work which he admitted he obtains almost entirely on his own, apart from the respondents. Tr. 183-185. Foti gets most of his work through "networking, . . . word of mouth. I constantly speak to people about what's up and coming. . . . I speak to people mostly while we're on job sites. A lot of the people there do other things as well in the industry and keep their ear to the ground and see what's coming up, what's going to be available locally and otherwise.

"I hear radio advertisements [about] what's coming to the casino or what's coming to the Meadows or the Dodge. And I pretty much know that. . . those calls are coming up and there is going to be work because I hear it on the radio or television or whatever." Tr. 189.

"I could go on-line and look to see what shows and what dates are coming up. [I would] call somebody that I know to see if that work is going to be viable or coming up. . . . [N]etworking. . . , word of mouth, talking to other people, seeing what's going on, seeing what shows are coming up, and then just following through with either a

phone call if I happened to know somebody that's doing it, or. . . they could call somebody and have them call me, but it's just basically networking." Tr. 189-190, 500.

Foti first worked in Local 84's jurisdiction on May 10, 2002. Tr. 479. (This was his "date of hire" for purposes of the referral lists developed in 2005 and later.)

Foti acknowledged that after his membership was rejected in May 2004 and he lost Local 84/SRS referrals, he was "off about a week." Tr. 193. His being rejected by Local 84 had no impact on his ability to network with other locals and with nonunion employers. Foti admitted he was always free to call business agents at other locals and "take opportunities of shows they had coming up. . . ." Tr. 193. He admitted "right after May 28th [2004], after the beginning of June" he got a job "at Giant Stadium because I had no work, and I called and started the ball rolling for myself there. At that point I would just call if I didn't have anything. I would call either as many friends as I know in the business to see what's going on, other business agents, and network. . . ." Tr. 194.

"I have a very strong network myself and I've been called by many people to see if I can help get them work. And prior to becoming a member of 84, I did have work at times when other people didn't, and [I actually have] taken members [of Local 84] to venues in New Jersey and New York, and they used my connections to help themselves get work. So it's a give and take. . . when things are slow, that's what people do. They call each other." Tr. 195-196.

He did so well networking, Foti was not interested in taking a full-time position at the Mohegan Sun. Tr. 480-482. "I do very well freelancing. I have a strong network and some employers I can count on.... I have freelanced since day one here in Connecticut." he said. Tr. 482-483.

Foti testified he talks with hundreds of people in the industry, and others in the industry make a living by doing the same kind of networking he does. Tr. 195. Foti testified his method of attaining work through this networking was not different from other stagehands. Most stagehand work is "a one-day gig. You go in, set it up, and then take it out at the end of the day." Tr. 196.

Foti acknowledged, "I very rarely didn't have any work, if ever." Tr. 193.

Foti admitted that throughout the base period he worked with Local 538 as well as Local 84 and SRS. After he was voted down for membership, he continued working with Local 538, whose territory covered New London and part of Rhode Island. Tr. 201. He was spending most of his time working with 538. Tr. 486.

Foti was quite proud of his networking abilities. He explained how he was able to solicit work not only from Local 53, but also from Local 632, Local 4, Local 340, Local 538, etc. Tr. 259-260. He admitted that his networking was so effective that after he was voted down for membership in Local 84, he barely missed a beat by getting both union and non-union jobs. Tr. 260-269, 487. The only difference between taking Local 84 work rather than work from another local was that with Local 84 work, the business manager (Buckland) called him. He had to initiate the call to the business managers or other hiring agents (if a non-union job) outside of Local 84. See Tr. 200, 500. Mr. Buckland examined Mr. Foti's work record which was produced at the trial and found that Foti had gotten more than 200 referrals from his networking in 2005, Tr. 551, and more than 170 in 2006. Tr. 550-551. Foti did not need referrals from Local 84. He called in to Local 84 only a dozen times in 2005 (and got 8 referrals). In 2006, he called in a dozen times between January and March and did not call in at all between March and

August. Even after he became a member of Local 84 in 2006, he did not call in for more than a month. Tr. 550-560.

Foti's networking was so effective he was largely unavailable for work with Local 84 in 2005 and 2006. Tr. 603, 606-608. And when he had no work, he did call in to Local 84, and he was given referrals. Tr. 486, 551, 559, 589. From December 3, 2004, when Mr. Morris, president of Local 84 called Foti, until today Foti has never been turned down for work when work was available. Tr. 606-608.

The Base Period for Gross Backpay

The base period is June 1, 2003 through May 31, 2004. Tr. 44. Respondents do not contest this.

The Region Abdicated To Foti The Determination Of What Are "Local 84" Earnings

In applying Formula One, Emirzian was supposed to calculate Foti's "average. . . earnings . . . prior to the unlawful action." § 10540.2 She was supposed to differentiate between Local 84/SRS referrals on the one hand, and non-Local84/non-SRS referrals on the other. (Local 84/SRS referrals were frequently referred to during the hearing as "Local 84 work.")

Emirzian claimed to have done this, Tr. 110, 111, but it was really Foti who made the decisions. Emirzian and the GC repeated over and over that they simply accepted as true what Foti identified as "Local 84 work" and what was supplemental earnings from non-Local 84/non-SRS sources. Tr. 47, 110-111, 114, 116, 189. (Ms. Emirzian: "[W]hat we basically did was sat down with Mr. Foti, who separated [his pay stubs] out

for me and explained which jobs came through the Local and which jobs he would have gotten on his own." Tr. 60. Mr. Daly: "[Emirzian has] said numerous times, both on direct and cross that she and the Region before her had accepted Mr. Foti's representations." Tri. 116. Mr. Daly: "The determination within the Region as to whether it's a Local 84 job or not is based on Mr. Foti's representation to the Region." Tr. 154.)

It would have been a simple matter for the Region to work off an accurate list of employers who took referrals from Local 84 because they are listed in Exhibit GC-10, including the Warner, and the Region had Local 84's collective bargaining agreements. But most of the money Foti claimed to have earned from Local 84 work during the base period was from employers who had no contractual relationship with either Local 84 or SRS. Foti could have, and did, obtain these earnings on his own.

Local 84's business manager helps out business managers in other areas "who are struggling to fill their needs" by giving out the phone numbers of stagehands who might be available for work, or calling the stagehands himself. Tr. 348. These other locals might be Local 74 in New Haven, Local 53 in Springfield, Local 133 in Stamford, Local 109 in Bridgeport, Local 32 in Rhode Island, Local 11 in Boston, Local 52, a movie and television local in New York. Tr. 348-349.

Local 84 does not supply stagehands directly to the employers outside Local 84 jurisdictions. Local 84's business manager will facilitate other business managers in obtaining enough bodies to handle the demand outside of Local 84's jurisdiction, but those stagehands get their employment from the other business managers, not from Local 84. There was dispute at the trial over the meaning of the word "referral" -- whether one business manager facilitating another business manager in getting

stagehands to do a load-in or load-out in another jurisdiction is a "referral" -- but there is no dispute that even if it is a referral, it is a one-day referral. Tr. 415-416, 527, 551-552. Buckland testified, "If a business agent is looking for people,...I will supply him with names of people. At his pleasure, either I or he'll call them. So after that it's up to the referral whether he wants to continue working there or not." Tr. 417. If the stagehand takes on work in the foreign jurisdiction after the first day, it is strictly a transaction that occurs between the stagehand and the other local. Local 84 plays no part in the transaction. Tr. 418.

Not only did the Region completely rely on Foti to differentiate "Local 84 work" from his supplemental earnings during the base period, the Region never even defined for him what "Local 84 work" was, as Emirzian admitted. Tr. 115 -116. This was a serious oversight which caused the Region to grossly inflate Foti's gross backpay. If she had told Mr. Foti what she admitted at trial, that the *sine qua non* of "Local 84 work" was Local 84 having an agreement with the employer, there would have been no need for a trial. The parties would have agreed on the compliance figure.

Earnings Which Were Not Properly Categorized As Local 84 Work

In simply "accept[ing] Mr. Foti's representations," as Mr. Daly put it, concerning what was and what wasn't Local 84 work, the Region made a serious blunder. Of the \$29,757 Ms. Emirzian calculated as Foti's earnings during the base period, \$16,301.84, was not earnings derived from Local 84 referrals. Specifically, earnings from Entertainment Partners, Volume Services America, and Local 53 International Alliance

were improperly categorized as Local 84 referrals, as well as vacation pay earned prior to the base period. .

Emirzian made this key admission at the hearing that, fatally, undermines her calculation of gross backpay. She admitted that in the category of "Local 84 work," the only earnings that are germane are earnings from referrals by Local 84 or SRS to employers who had a contract with Local 84 or SRS. Tr. 111-113. She said there did not have to be an exclusive agreement to supply labor to the employer, **but there had at least be an agreement between Local 84 or SRS and the employer to supply labor.** Tr. 170.

Q. "[I]f [Foti] called the union hall and talked to Chip Buckland, the Business Manager and Chip Buckland referred him to the Bushnell, a venue with which Local 84 has a contract to supply labor ... that would be Local 84 work? [...]"

Emirzian: Yes.

Q. Now what if, to give another example,... Mr. Foti called Mr. Buckland and said, 'I'm available for work, do you have anything?' and he said, "No, I don't, but I understand that Local 53 in Springfield may be hiring. Why don't you give them a call?" Is that Local 84 work? ...

Emirzian: I think it would count as Local 53 work."

Q. Why?

Emirzian: "Because the work, the actual job came then out of Local 53." ...

Q. So what if there were a situation exactly the same as I just described in Local 53 but [Mr.] Buckland said, "I don't have any work for you, but I understand that the ABC Company in Stamford has a show coming..., why don't you give them a call?".... Would that be Local 84 work?

Emirzian: I suppose it could be counted as Local 84 work.

Q. How could it be Local 84 work?.... There is no contract between Local 84 and this place.

Emirzian: ... [A]ctually I'll reverse me. That is counted as work he had gotten on his own.

Q. Again, isn't the reason because the decision-maker, whether to hire Foti or not, is down there in Stamford, not ... where Local 84 is?

Emirzian: That would be how I look at it.

Tr. 118-120.

Later, she repeated this: **"There has to be some agreement between the union and whomever they're getting work out to...."** Tr. 170 (emphasis added).

It is only logical that "Local 84 work" was employment where the employer (including SRS) had an agreement pursuant to which Local 84 supplied labor. When Foti was referred to a Local 84 job, he signed a checkoff card pursuant to which dues, and benefits were taken out and sent to Local 84. Every one of the check stubs from work that actually was Local 84 work was done this way. Tr. 221-226. When Foti worked at the Meadows, the Horace Bushnell Memorial Hall, Madison Square Garden, and TSE dues were taken out and sent to Local 84. Transcript, 222-226.

But, when Foti worked at Entertainment Partners on the movie Stepford Wives, dues were not sent to Local 84, but were sent to Local 52 because Local 52 was the referring local. Tr., 227-232. When he worked for Volume Services America, the dues were sent to Local 109 in Bridgeport, Connecticut, because there was an agreement, not between Local 84 and the employer, but between Local 109 and the employer. Tr., 232-234. When he worked at an employer with a contract with Local 53, the dues went to Local 53, not Local 84. Tr., 234-235.

Emirzian admitted that if the designation of earnings as "Local 84 work" were wrong, her entire calculation of backpay would be wrong. Tr. 115. But Foti made it clear

in his testimony that his work with Entertainment Partners had nothing to do with a contract between the employer and Local 84 or SRS. Foti's work with Entertainment Partners was the result of a contract between Local 52 and Entertainment Partners. Referral fees were taken from Foti's paychecks and given to Local 52 pursuant to their agreement. That is why every Entertainment Partners pay stub in Exhibit GC-3 lists money being paid to Local 52, not Local 84. Similarly, Foti's work with Volume Services America was not pursuant to any contract between Local 84 and Volume Services. It was a referral from Local 1 pursuant to a contract between Local 1 and Volume Services, and every pay stub shows that referral fees were paid to Local 1. Finally, the pay stub from the Local 53 International Alliance shows that dues were paid to Local 53, not Local 84.

It is baffling, therefore, Emirzian did not bother to tell Foti that for a job to be "Local 84 work" it had to have been with an employer who had an agreement with Local 84 or SRS to obtain labor. It is also baffling why Emirzian or Mr. Daly did not simply cull out the employment for which there was no such contract, for the Region had Local 84's contracts and a list of employers who were Local 84's "clients." See Exhibits GC-10. It is baffling that Emirzian twice revised her compliance calculations during the hearing, but did not revise them to eliminate from her calculation of gross back pay Foti's earnings that did not belong there. Tr., 294-298.

Local 53 International Alliance Was Wrongly Categorized As "Local 84 Work"

Exhibit GC-3 and Emirzian's calculation of Local 84 work inexplicably includes \$620 earned from working with Local 53 in Springfield, Massachusetts. Foti admitted,

that, as with all his "referrals" to another local, he was "hired" by the steward in Massachusetts and put to work on a job for an employer that had an agreement with Local 53—not Local 84—to supply labor. This would be no different from Foti's networking. In fact, it is part of his networking—finding out from people in the union where labor is needed and getting hired. Foti admitted that because he was not a union member, he was free to solicit work from union Business Agents everywhere, and he did. Tr. 241-243.

Volume Services America

Exhibit GC-3 also includes as "Local 84 work" the following earnings from Volume Services America: \$241.13 on March 17, 2004; \$63.04 on March 31, 2004; \$69.34 on May 12, 2004. The total of the money earned from Volume Services America during the backpay period was \$373.51.

But Foti admitted the referral came from Local 1 in New York. He admitted it was part of his own networking. Tr. 242-243. These earnings were categorized as Local 84 earnings only because former Compliance Officer Diaz did not specifically ask him about it. Tr. 242.

Entertainment Partners

Exhibit GC-3 includes as "Local 84 work" the following checks from Entertainment Partners, EPSG Management Services in New York City, for work by Foti on the Paramount Pictures movie, "The Stepford Wives": \$1407 on October 10, 2003; \$2245 on October 16, 2003; \$2537.50 on October 22, 2003; \$1891.50 on October 29,

2003; \$1035 on November 19, 2003; \$2902.50 on November 25, 2003; \$2160 on December 10, 2003; \$1080 on December 18, 2003. The total amount of money earned from Entertainment Partners during the backpay period is \$15,258.50.

Emirzian conceded, "We have no record of how he got hired other than him telling us he got it through the Local." Tr. 157, 159. On cross examination, she said, "I don't claim there was a contract." Tr. 159.

Foti did this work from October 3, 2003 through November 26, 2003. The checks are dated 10/8/03, 10/16/03, 10/22/03, 10/29/03, 11/19/03, 11/25/03, 12/10/03, 12/18/03. See Exhibit GC-3, in the bundle labeled by Emirzian as "May 03-May 04 Local 84." See Tr. 227. Each check shows that union dues were withdrawn by the employer and sent to Local 52 pursuant to an agreement by which Local 52 referred stagehands to work for Entertainment Partners. Tr. 227-232.

Even apart from Emirzian's admission that an agreement with Local 84 to supply labor was necessary, it was obvious this was not Local 84 work. Immediately prior to October 3, 2003, Foti worked for the same company, Entertainment Partners, on the same film, "The Stepford Wives." He worked there from September 4, 2003 through September 28, 2003. See Exhibit GC-3, in the second packet in the exhibit, labeled by the Region as "May-03-May 04 Non-local 84 Work." These referrals, the Region admits, were not "Local 84 work" but were Local 52 work. As with the checks that supposedly was "Local 84 work," union dues were paid to Local 52, not Local 84. Even Foti admitted these September jobs had nothing to do with Local 84; he had received the reference from a friend in Local 1. Tr., 244-246.

So what is the Region's and Foti's rationale for contending that Foti's employment by Entertainment Partners in September was not Local 84 work, but the work that began a week later was Local 84 work? Foti said Buckland called him, apparently between September 26 and October 3 and told him to report for work for one day, October 3. Tr. 236. Foti testified Buckland's instructions were to go to an outdoor location shoot on the Merritt Parkway, where he checked in with officials from Local 52. Tr., 236-238.

Buckland recalled being called by someone who was not a Local 52 official. It was late in the afternoon. The caller was desperate to get four or five people to the production site the next morning very early. They could not find any other stagehands. When the caller mention the movie "Stepford Wives," Buckland recalled that Foti had worked on the movie already. Buckland assumed that meant Foti would know where to show up. It was late in the afternoon or early evening, and Foti had always been good about taking "on the spot" calls, so Buckland called him and told Foti that if he was interested in taking the call he could go to New Canaan, Connecticut. Buckland's recollection was that he gave Foti a phone number to call. "And then, the next thing I knew," Buckland said, "I heard that these people were called him back personally without going through any union office." Tr. 568. Buckland thought it was a one-day job. Tr. 569.

But even if this somehow could be considered a Local 84 referral, Foti admitted it was a referral only for one day. He admitted that after the first day, the work was Local 52 work. "It was Local 52 that I worked for, yes," he said. He admitted Buckland had absolutely nothing to do with referrals to Entertainment

Partners after October 3. Tr. 238-239. He admitted it was Local 52, not Buckland or Local 84, that asked him to return after that first day. Tr. 239. And Foti also acknowledged that, throughout, it was Local 52, not Local 84, which had the agreement with Entertainment Partners. Tr. 228.

Vacation Pay Earned Prior to the Base Period

Exhibit GC-3 includes a payment of \$18.55 from the Horace Bushnell Memorial Hall not for work performed during the backpay period but for vacation pay performed prior to the backpay period.

Exhibit GC-3 includes a payment of \$31.28 on July 25, 2003 from TSE not for work performed during the backpay period but for vacation pay performed prior to the backpay period.

The Region's Calculation of Supplemental Earnings Is Illogical

Central to Ms. Emirzian's analysis is the supposition that Foti's Local 84 work is one thing, and Foti's work--doing exactly the same kind of work, but for other employers and often other locals--is supplemental earnings. See Tr. 45-54, 57-75. Foti, in truth, had no supplemental earnings at all. As he testified, his vocation was working "in entertainment." Sometimes it was work affiliated with Local 84, but more often than not it was work affiliated with another union local, or with no union at all. But no matter what the affiliation was, it was still stagehand work "in entertainment."

Ms. Emirzian's and the Region's division of Foti's employment into Local 84 work and supplemental work was founded on application of an example from Compliance

Manual, §10554.4. Emirzian cited the example of "someone whose main job is during the day and he works at night as a musician." Tr., 172. The example is: "a discriminatee worked as a musician during evening hours prior to the unlawful action; he continued this part-time work during the backpay period working as a musician for different employers. These earnings are not offset against gross backpay." Tr., 173. She contended this example meant that Foti's main source of work was Local 84 work (she mistakenly believed he made more money doing Local 84 work than non-Local 84 work), and that in turn meant the non-Local 84 work was the analog to a few hours in the evening playing music.

In the example, the discriminatee was moonlighting as a musician. "It is well established that supplemental earnings from 'moonlighting' jobs constitute an exception to the general rule regarding interim deductions and such supplemental earnings are not properly deducted if the employee had the moonlighting job prior to his or her unlawful discharge." Jackson Hosp. Corp., 184 L.R.R.M. 1205 (2008) (citing Birch Run Welding and Fabricating, Inc., 286 NLRB 1316, 1318 [1987], enfd. 860 F. 2d 1080 [6th Cir. 1988]). But Foti's work as a stagehand at Entertainment Partners, Local 1, Local 53, Local 340 in New York, the New Jersey Sports & Exposition Authority, Beach Concerts, the Tribeca Film Festival, the Metallica concert, the Jimmy Buffet concert, the Lollapalooza concert, the Bruce Springsteen concert, American Idol, the Aerosmith concert, the 5-Cent/ Snoop Dog concert, the Justin Timberlake concert, the Stepford Wives movies, etc. (all taken from the non-Local 84 2003-2004 packet in GC-3) was not moonlighting work. It is what Foti did for a living. It was his main job.

And, unlike moonlighting jobs and second jobs of all kinds, Foti's so-called supplemental employment interfered with his so-called main job. Emirzian and Foti both admitted that if he were engaged in work at one of the so-called supplemental jobs, he would not be available for his so-called main job. "[H]e can't be in two places at once," Emirzian admitted. Tr. 144, 109-110, and as Foti admitted. Tr. 493.

Since Emirzian's calculations and testimony was grounded in the assumption that Foti's main job was Local 84 and SRS, and all his other stagehand work was merely moonlighting; and since this assumption is facile; her testimony and calculations must be discarded totally. There are no supplemental earnings in this case.

Sum of Earnings That Do Not Belong In Category of Local 84 Work

The earnings that should not have been counted as Local 84/SRS work:

Local 53	\$ 620.00
Volume Services America	\$ 373.51
Entertainment Partners	\$15,258.50
Vacation Pay Earned Prior To Base Period	<u>\$ 49.83</u>
Total	\$16,301.84

Earnings Which Were Properly Categorized As "Local 84 Work"

Exhibit GC 3 contains Mr. Foti's pay stubs from 2003-2008. They are broken down by so-called "Local 84 work" and "non-Local 84 work." Tr., 154.

The respondents agree the following referrals are properly considered to be "Local 84 work": all referrals by Stagehands Referral Service LLC, Tr., 154; all referrals by Theatrical Stage Employees, Local 84 ("TSE"), 155; all referrals to the employers which had agreements with Local 84; to wit: the Meadows Music Theatre, Tr., 155-156;

the Horace Bushnell Memorial Hall, Madison Square Garden ("MSG"). Tr. 60, 156; Madison Square Garden, Tr. 156, and the clients listed in GC-10, including the Warner Theater.

The following earnings were from Stagehands Referral Service, LLC (SRS): \$380.06 on June 6, 2003; \$77.96 on June 13, 2003; \$97.45 on July 11, 2003; \$233.88 on July 18, 2003; \$428.79 on August 8, 2003; \$380.06 on September 5, 2003; \$175.41 on September 12, 2003; \$175.41 on October 24, 2003; \$77.96 on November 14, 2003; \$370.32 on November 28, 2003; \$1364.30 on January 16, 2004; \$331.33 on January 23, 2004; \$789.35 on January 30, 2004; \$409.29 on February 6, 2004; \$292.35 on March 5, 2004; \$214.39 on March 19, 2004; \$682.15 on April 23, 2004; \$77.96 on April 30, 2004; \$97.45 on May 14, 2004. The total earned from SRS in the backpay period was \$6,655.87.

The following earnings were from Theatrical Stage Employees (TSE): \$132.09 on June 13, 2003; \$198 on March 12 2004. The total earned from TSE in the backpay period was \$330.09.

The following earnings were from the Meadows Music Theatre: \$489.22 on June 27, 2003; \$1238.13 on July 11, 2003; \$962.39 on August 8, 2003; \$459.83 on August 22, 2003; \$186.36 on September 5, 2003; \$139.77 on April 2, 2004; \$124.24 on April 16, 2004; \$4.96 on April 30, 2004. The total earned from the Meadows in the backpay period was \$3604.90.

The following earnings were from work performed at the Hartford Civic Center, owned by Madison Square Garden: \$281.10 on July 24, 2003; \$238.94 on August 28, 2003; \$188.18 on a date which is not shown on the checks; \$405.30 on April 4, 2004;

\$164.05 in May 2004. The total earned from at Madison Square Garden in the backpay period was \$1,277.57.

The following earnings were from work performed at the Northwest Connecticut Association for the Arts, in Torrington, Connecticut (The Warner): \$153 on November 26, 2003; \$238 on December 12, 2003; \$153 on April 30, 2004. The total of the money earned from work at The Warner during the backpay period was \$544.

The following earnings were from work performed at the Horace Bushnell Memorial Hall: \$278.88 on March 25, 2004. \$278.88 was earned from The Bushnell in the backpay period.

The following earnings were from work performed at the Oakdale Theatre: \$393.40 on April 8, 2004. A total of \$393.40 was earned from work at the Oakdale Theatre in the backpay period.

The Correct Calculation of Gross Backpay During the Base Period

The total money earned by Foti from Local 84 work in the base period was \$13,084. Emirzian was off by \$16,673. Her calculation was 227% too high. She then compounded that error for four years of calculations.

If Formula One were to be used at all, the base gross backpay figure would have to be \$13,084 annually, or \$3,271 quarterly, instead of the Region's \$7,439 quarterly figure. See GC-6.

The figure of \$13,084 was based on Mr. Foti's check stubs in GC-3, less the pay stubs from jobs that were not Local 84 referrals. Since "[r]eproducibility is one of the main principles of the scientific method....," Wikipedia ("Reproducibility"), Buckland was

asked to recompute the gross backpay figure during the base period by looking at his own weekly payroll file, and the results were remarkably close. Buckland came up with a total of **\$13,078.46**. See Tr. 505-506 and Respondents' Exhibit 2. (Mr. Daly was given an opportunity to review the underlying documents Buckland used to determine that figure, and he reported back to Judge Davis that he had reviewed the documents and accepted Buckland's calculations as being accurate, though he undoubtedly will continue to challenge the respondents' argument about what is Local 84 work.)

Then, doing a third calculation based on Foti's annuity records, which had just been subpoenaed from the International by Mr. Daly, Buckland recalculated Foti's Local 84 earnings during the backpay period and came up with a figure that was only \$9.41 lower than the \$13,078.46 figure. Tr. 511-519. Respondents' Exhibit 2 (handwriting) and Respondents' Exhibit 3. This number is \$13,069.05.

Emirzian's Determination of Length of Backpay Period Is Incorrect and Illogical

Emirzian and the GC contend the backpay period continues to run. When she was asked whether there was any evidence Foti was not getting referrals from the respondents, she referred solely to "the numbers." Tr. 121. Because she believed that Foti has never made as much money from "Local 84 work" as he had in the base period, backpay continues to accrue. But she was wrong first because she exaggerated the amount of Local 84 work Foti received in the base period. If she had used the right quarterly figure, \$3,271, she would have seen that Foti's Local 84 earnings exceeded \$3,271 in the 4th quarter of 2006, and exceeded it in the second, third, and fourth quarters of 2007. See Notes 11-15 of GC-6.

Foti admitted he received nine referrals from Local 84 in 2004 and twelve referrals in 2005. Tr. 484-486. In 2005 and 2006, he was mostly not available for Local 84 or SRS because he was working with Local 538, Aventek, and elsewhere. Tr. 486-487. He was in exactly the same position he was in during the base period, when he worked with Local 538, Tr. 202, and he used his extensive network to pick and choose the most favorable jobs. In July 2006, Foti became a member of Local 538. Tr. 488. In August 2006 he became a member of Local 84 because Local 538 was merged into Local 84. Tr. 488. He suffered no discrimination in 2005 and 2006.

The Region's contention that the backpay period continues to run is illogical. The purpose of compliance is not punitive; it is not to give Foti more money than he would have made if there had not been discrimination. It is to make Foti whole, not more than whole. §10536.1 of the Compliance Manual cautions: "The act is remedial;... its intent is to restore the situation to that which would have taken place at the violation not occurred." §10536.2 states that the backpay period ends when a valid offer of reinstatement is made, when conditions in effect prior to the unlawful action have been restored, or when conditions have materially changed.

It is uncontested that Foti was given a valid offer of reinstatement in December 2004, when Local 84's president, Chuck Morris, and Buckland called him after receiving his unemployment claim. Tr. 548-549, 197. Buckland received the notice from the unemployment office, and Morris then called Foti. Morris told Foti that if he wanted to work with Local 84 all he needed to do was call. Tr. 549. Foti did then call, and he did then get referred to work. He went to the Mohegan Sun on December 3, 2004. Tr. 549. From that date forward, whenever Foti called and there was work, he got work.

Buckland knew he was under the NLRB's scrutiny and he "wasn't about to start messing around with Mr. Foti and his ability to work or not work." Tr. 550.

Foti, furthermore, was busy working at jobs his "network" fetched and was not available to take Local 84 referrals in the fourth quarter of 2004 and subsequently. Even Ms. Emirzian acknowledged this. Tr. 53, 141, 142. Foti acknowledged this. Tr., 200. He was working regularly with Local 538 at the Mohegan Sun in 2005. Emirzian admitted knowing this, Tr. 133, 142-143, but she ignored it. Foti obtained, through his "network," 200 referrals in 2005 and more than 170 in 2006. Tr. 550. During most of 2005 and 2006, Foti "wasn't heard from" in Local 84. Tr. 550. In the rare times in 2005 and 2006 when Foti was not employed, he did call in to Local 84 and he did get referrals. He called in a dozen times in 2005 and got eight referrals. Tr. 551-552. He did not call in more often because he was busy working at Aventek and with Local 538. Tr. 485-486. Foti admitted he had been working with Local 538 "the entire time I had worked with Local 84 and the base period too." Tr. 201.

The Region also ignored the fact that conditions changed radically in the first quarter of 2006, when Local 84 lost the largest "client" it had, the Mohegan Sun. When SRS began supplying stagehands to the Mohegan Sun, Local 84 went from a small local with only two sizable venues to having shows almost daily. Tr. 412. Foti began working with Local 84 for the express purpose of getting referrals to the Mohegan Sun, and during the backpay period he worked principally at the Mohegan Sun. Tr. 452-453, 477. As shown above, in the section detailing his Local 84 work during the back pay period, Foti earned nearly twice as much money from the Mohegan Sun during the backpay period than his next most-lucrative venue, the Meadows. Even Foti admitted

he would not be entitled to backpay measured by the money he formerly had earned working with SRS after SRS lost the Mohegan Sun. Tr., 279.

The Compliance Manual, §10542.5 cautions that if the employer's operations were reduced during the backpay period, the gross backpay analysis must take that into account, for the discriminatee would likely have lost income even if there had not been unlawful action by the respondent. The loss of SRS was obviously the kind of reduction in operations §10542.5 addressed, but the Region made no allowances for the reduction at all.

Foti, furthermore, exceeded his base period Local 84 earnings by the fourth quarter of 2006, as already shown. And this was despite the fact that Foti's principal source of "Local 84 work," SRS' referrals to the Mohegan Sun, became completely unavailable because SRS had stopped making such referrals in March 2006. Emirzian admitted this was true but ignored it. Tr. 126-127, 132.

Emirzian (or perhaps it was Diaz before her) mindlessly crunched the numbers to come up with a pretext to extending the backpay period, proving the Region's calculations are punitive, not remedial. The Region failed completely to take into account that Foti became a union member in June 2006, when he became a member of Local 538. Tr. 202. The Region ignored that he became a member of Local 84 in July 2006 Tr. 124, 204. Unless the goal of a compliance proceeding were punishment rather than remediation, it is illogical in a case where a union is accused of discriminating against the discriminatee because he was a non-member that the backpay period would extend beyond the time when he became a member.

The Region ignored, too, that conditions changed in and after October 2005 because Local 84 revamped its referral system as a result of this case. Buckland frankly admitted Local 84's referral system discriminated against non-members. This was because of ignorance, not malice, and Local 84 implemented a seniority-based referral system. The referral list went through a number of iterations in the next two years, and it was not adopted officially by the membership until 2007, but Buckland started making his referrals by "hire date," meaning the date when each stagehand first took a Local 84 referral. Members and non-members were treated the same. Tr. 375-376, 380-387. This change disadvantaged Foti, because he was fairly low on the seniority list. He was 177. Tr. 534.

The Correct Calculation Under Formula One

If the Region had used Formula One, and had properly included only actual "Local 84 work" in the calculation of gross backpay during the base period, and had properly ended the backpay period when Foti started receiving referrals again on and after December 3, 2004, the correct calculation of total backpay under Formula One would be as follows:

Gross backpay ("Local 84 work") during base period (June 1, 2003-May 31, 2004) =	\$13,084
Length of backpay period (June 1, 2004-December 3, 2004) =	6 months (1/2 year)
Interim Earnings =	0
Net backpay =	\$6,542 (1/2 x \$13,084)

As will be seen below, this net backpay figure calculated under Formula One is virtually the same as the net backpay figure under Formula Two and Formula Three.

The Region Should Not Have Selected Formula One

As already shown, only about 12 stagehands within Local 84 have full time stagehand jobs. Tr. 353, 451. Most stagehands are itinerant workers who travel in and out of Local 84's jurisdiction to cobble together the equivalent of a full time job. Feast is followed by famine, such as when the Mohegan Sun Casino stopped using Respondent SRS to supply stagehands, and SRS essentially went out of business. The stagehand vocation, in short, lacks the consistency and predictability that Formula One requires.

The Region has never explained why Formula One was selected for computation of the compliance specifications. A previous compliance officer, Nestor Diaz, made the decision, Tr. 41, 75, but he retired, and the GC's witness at trial, Dina Emirzian, who succeeded Diaz, Tr. 40, played no part in selecting Formula One. Tr. 175. No other formula apparently was ever considered.

The Region, furthermore, has never presented a principled justification for making this all-important threshold decision. The Region's only justification, which has no evidentiary support, is that the compliance officer did not have access to the information it needed to assess any other formula. Tr. 98-101, 176-180. The Region had access to all of Local 84's records. Tr. 539, 603-604.

The Region claims Formula One is a reasonable formula, Tr. 99, 103, but Emirzian admitted neither she nor the Region made any calculations using Formulae Two to determine whether Formula One was the most reasonable, and she did not

review any documents relevant to any other methodology. Tr. 99, 100, 101. The Region asserted its burden is simply to apply a "reasonable" formula, but that is not the whole story. The aim is to determine the "most accurate method" of calculating backpay. . . . " Alaska Pope Corporation, 36 NLRB 522 (1998) (citing American Mfg. Co. of Texas, 167 NLRB 520 [1997] [the judge's task is not to simply approve the General Counsel's formula if he finds it reasonable, but "to consider whether [that] formula is the proper one in view of all the facts adduced by the parties and to make recommendations to the Board as to *the most accurate method* of determining the amounts due"])).

But the manual cautions that Formula One is not appropriate when conditions during the backpay period have changed, as happened here. The method also is based on assumptions that do not apply here, that the discriminatee works a regular job, with a regular schedule and wages, such that lost pay because of discrimination can be predicted by the formula. The manual cautions that it is most appropriate for a short backpay period, and that it becomes unreliable in longer backpay periods, as in this case. §§ 10540.1 and 10540.2.

III. FORMULA TWO CALCULATIONS

As shown above, three methods were used to calculate Foti's Local 84 earnings during the back pay period, and the results were virtually identical. Foti's annual Local 84 earnings were just over \$13,000; just over \$6,000 for the six months (June-December, 2004) Foti was not referred to work by Local 84 or SRS.

The respondents have calculated Local 84 work in a fourth way, and the results are the same. Formula Two, described in §10540.3 of the Case Handling Manual, calculates backpay based on the earnings of comparable employees instead of the average earnings of the discriminatee prior to the illegal conduct, used in Formula One. The manual states that it is appropriate in situations, such as here, where the availability of work and earnings are variable. It is used in situations, as here, when the "[a]vailable work is shared among the employees and their average earnings are about the same, but their earnings vary substantially over time." §10540.3. This method "is particularly applicable when there have been significant changes in conditions..." Id.

Buckland selected four comparable employees. Two of them, Graves and Tsimbidaros, were not union members. Two of them, Philbin and Shea, were union members. All of them began working with Local 84 at approximately the same time as Foti. Tr. 519-522. All five have similar skills, the basic stagehand skills. Tr. 522-523. Buckland went through every referral the "comparables" worked from the base period through 2006 and came up with earnings.

Among the four comparable employees, two who are union members and two who were not, there was no pattern of favoring the union members. While it is clear that Foti did not earn as much as any of them in 2005 and 2006 (Buckland testified that Foti essentially disappeared in those years and called in only about a dozen times each year because he was working elsewhere), it is also clear that the none of the comparable employees earned anything like the \$29,757 Emirzian and the Region assumed in their application of Formula One.

In 2005, the two non-members (Graves and Tsimbidaros) earned respectively \$21,482.50 and \$7,471.73, while the two members (Shea and Philbin) earned respectively \$13,151.14 and \$15,011.08.

In 2006, the two non-members (Graves and Tsimbidaros) earned respectively \$10,651.10 and \$8,329.05, while the two members (Shea and Philbin) earned respectively \$13,260.38 and \$12,014.88.

The average annual Local 84 earnings were \$12,671 per year, or \$6,335.50 for six months. It is clear that Buckland's estimates are a lot more realistic than Emirzian's because they essentially replicate the other calculations.

IV. CALCULATIONS USING NO FORMULA AT ALL

The Compliance Manual does not require that a formula be used at all, §10542.1, and no formula is necessary here. Mr. Buckland went through his call lists for the six months after Foti stopped getting referrals at the end of May 2003 until he started getting referrals again, in December 2004. He wrote down every call and every venue Foti might have been referred to in that period. Tr. 533. Even though Foti was listed 177 in the date-of-hire list, Buckland "credited" him with a referral if more than 12 people were on the call. Tr. 534. (He assumed that if only 12 people or less were on the call, there was no chance Foti would get a referral.) In pages 535-545 of the transcript, and in Respondents' Exhibit 5, Buckland calculated that Foti missed out on opportunities to earn \$6,039.09 in six months, or \$12,078.18 annually. Tr. 537. This is the fifth calculation proving the respondents' argument that Emirzian wildly inflated the backpay figures. It proves just what Buckland was saying: Out of all the stagehands who work

with Local 84, no more than approximately 12, those who hold full-time "house" positions, earn enough money to live on without traveling outside Local 84's jurisdiction for daily work.

V. CONCLUSION

The respondents have shown in five different ways the method by which the Region calculated gross back pay in the base period is wrong. The respondents' five separate calculations, on an annual basis, are \$13,084, \$13,078, \$13,069, \$12,671, and \$12,078. Each one is reasonable. The average of them is \$12,796. It would be reasonable to use that number, annualized, so the net backpay for the six month period from the onset of the alleged discrimination to Foti's being restored to the referral list is \$6,398 (plus interest).

For the Respondents,

/s/ Leon M. Rosenblatt
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CERTIFICATION

This is to certify that a copy of the foregoing was emailed and mailed, postage prepaid, on this the 6th day of October, 2008, to:

Attorney Patrick Daly
National Labor Relations Board
Region 34
One Commercial Plaza
21 Floor
Hartford, CT 06103-3599

Mr. Stephen Foti
52 Balaban Road, Apt. 306
Colchester, CT 06415

Region 34 will be notified by telephone of the substance of the transmitted document and a copy of the document will be served by overnight delivery service.

/s/ Leon M. Rosenblatt
Leon M. Rosenblatt